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No. 89-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
PETITIONER,

V.

LARRY WOLLERSHEIM,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF THE PETITIONER CHURCH OF SCIENTOLOGY OF CALIFORNIA

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The National Council of Churches of Christ in the U.S.A. and Council on Religious Freedom respectfully move this Court for leave to file the attached brief as amici curiae in support of the Petition for Writ of Certiorari filed by the Church of Scientology of California pursuant to Rule 36.1 of this Court's rules. The Brief Amici Curiae is being conditionally filed with this Motion, copies of which have been served upon all parties. The written consent of the petitioner is filed concurrently herewith. The respondent has failed to indicate his position.

The National Council of Churches and Council on Religious Freedom believe that the issues presented in the Petition for Writ of Certiorari are of vital interest to their respective constituents. Some of the denominations

represented by the National Council of Churches are congregational and, if subjected to a punitive damage award of even a fraction of the award involved here, would be profoundly fiscally jeopardized.

The National Council of Churches and Council on Religious Freedom believe that the Petition filed in this case does not apprise this Court of the full extent of the problems posed by the "heresy" trials (such as has occurred here), as well as the far-reaching and chilling impact that punitive damage awards have against religious bodies.

Dated: March 28, 1990

Respectfully submitted,

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BRIEF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. AND COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF THE PETITIONER CHURCH OF SCIENTOLOGY OF CALIFORNIA

STATEMENT OF INTEREST

The National Council of Churches of Christ in the U.S.A. is the cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the United States, having an aggregate membership of over 40 million. This brief does not purport to represent the views of all of those persons, but is based on policies determined by their representatives sitting as the Governing Board of the National Council of Churches, a deliberative body of

about 250 persons chosen by the member denominations in proportion to their size and support of the Council. The policy which underlies this action was expressed by the Board in 1955: "The National Council of Churches defends the rights and liberties of cultural, racial and religious minorities." Policy Statement: Religious and Civil Liberties in the U.S.A.

The National Council of Churches believes that novel theories of tort liability based upon religious practices and beliefs pose a serious threat to the religious freedom of its member churches. It further believes that it is imperative that churches have ready recourse to the appellate courts in order to protect their First Amendment rights.

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies, including the judicial branch of government, which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion, whether that interference be from the executive, legislative, or judicial branches of the government.

The Council on Religious Freedom speaks to the legal issues raised by this litigation, not because it supports the doctrinal interests or aligns itself with the Church of

Scientology, but because of a more far-reaching concern that "heresy trials" will become vogue particularly as against disfavored religious groups and because punitive damages have now become a weapon to destroy churches and violate First Amendment projections.

SUMMARY OF ARGUMENT

Although the trial court in this case apparently believed that First Amendment rights of the Church of Scientology were given sufficient protection so long as the content of its religious practice was not placed before a jury, it nevertheless allowed the trial to be turned into a "heresy trial" by the introduction of "expert testimony" as to the psychological effect that such religious practices allegedly caused.

Amici are concerned with the introduction of such testimony before a jury in a case which claims that the plaintiff was the victim of intentional infliction of emotional distress visited by his church because, although the plaintiff voluntarily participated in the religious practice later condemned by his "experts," the condemnation is based upon the expert's theory that plaintiff's change in lifestyle resulted from "coercive persuasion." Amici believe that a close analysis will demonstrate that plaintiff's experts were in fact questioning the validity of the Scientology faith.

One expert at the trial concluded that the Church had engaged in coercive persuasion by finding the existence of certain elements in the structure and practice of the Church. Amici, however, believe that each of these discovered elements will normally be found as part of the practices of most religious groups which are successful in their efforts to proselytize and is normally referred to by mainline religions as the "conversion experience."

The expert's opinion must by its very nature be based upon a subjective determination as to the validity of a religion in order to distinguish those religious groups that engage in "thought reform" and those that do not.

Another of plaintiff's expert's testimony was based upon the assumption that Scientology is not valid, that those members who give public testimony as to their beliefs were prevaricators, that the Church's purported mission to save the world was a fraud, and that Scientology could not solve plaintiff's problems, but psychology could.

Such assumptions made by these experts and communicated to the jury turned the judicial proceedings into a heresy trial condemned in *United States* v. *Ballard*, 322 U.S. 78 (1944).

Compounding the problem is the fact that through the utilization of a punitive damage award, such a heresy trial becomes an effective means for the destruction of a disfavored religious organization.

Amici believe that allowing the jury to award punitive damages in this and similar cases violates the First Amendment. Amici contend that churches should enjoy at least as much protection from the imposition of punitive damage awards as do municipal governments and labor unions. They further believe that the fourth estate should not be preferred over the first estate—the church.

ARGUMENT

I. THIS CASE PRESENTS THE NOVEL ISSUE OF WHETHER THE RELIGION CLAUSES OF THE FIRST AMENDMENT PROHIBIT THE COURT FROM PERMITTING A JURY TO WEIGH THE BELIEFS AND TEACHINGS OF A CHURCH ON THE BASIS OF "EXPERT TESTIMONY" THAT IS INTRODUCED TO PROVE THAT ADHERENCE TO A RELIGIOUS BELIEF RESULTS FROM ALLEGED COERCIVE PERSUASION.

Amici curiae do not assert that the First Amendment protects all actions of a religious organization or that tort

proceedings against a religious organization in all instances amount to a heresy trial of that organization. However, amici believe that the judgment in this case was the culmination of a trial on the truth or falsity of doctrine of the Church of Scientology in violation of the fundamental constitutional principles advanced in *United States* v. *Ballard*, 322 U.S. 78 (1944). Amici are not simply altruistic in this filing but firmly believe that what occurred in the instant case may be experienced by numerous other churches. What occurred at the trial court level represents one of several "heresy trials" that, if left untouched by standards and teachings developed by this Court, will have a major chilling effect on the free exercise rights of religious congregations throughout this country.[1]

The trial court seemed to feel that First Amendment rights of the defendant church were given sufficient protection so long as the content of the church's religious practice referred to as "auditing" was not put before the jury, even though the jury was presented with evidence as to the psychological effect that certain auditing courses were alleged to have had on the plaintiff and was asked to award damages based on this effect. The curious distinction, in the view of amici, does not however satisfy the requirements of the First Amendment.

> The *Ballard* case does not hold merely that religious belief is protected. The Ballards engaged in action; they solicited money from the faithful. Rather, the holding of the case seems to be that regulation of

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[1] This is one of two cases where petitions for writ of certiorari have been filed with and are now pending before this Court. Both this case and *George* v. *ISKCON*, 213 Cal. App.3d 729 (1989), *petition for cert. filed*, 58 U.S.L.W. 3598 (U.S. March 20, 1990) (No. 89-1399), raise the same issues and provide this Court with the opportunity to review both cases together and to provide guidance to the trial courts in cases which are certain to arise in the future.

> religious activity which involved testing in court the truth or falsity of religious belief is barred by the First Amendment.

Founding Church of Scientology v. *United States*, 409 F.2d 1146, 1156 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969). Amici believe that the court in *Founding Church of Scientology* was correct in holding that action, as well as belief, is protected by the Free Exercise Clause.

In this case, the question was whether the plaintiff was entitled to recover on the theory of intentional infliction of emotional distress. The plaintiff faced a major hurdle for recovery due to the fact that he had voluntarily and eagerly participated in the religious practice of that church. In order to overcome this hurdle the plaintiff called two expert witnesses. First, Dr. Margaret Singer testified that Scientology practices and procedures constituted a "thought reform" program that was intended to, and did, deprive the plaintiff of his independent judgment and subjected him to the control of the Church of Scientology. Thereafter, the plaintiff argued that his conversion to Scientology was invalid. Next, Dr. Richard Ofshe testified that the Church of Scientology and its practices were intentionally structured in a way that would cause the plaintiff emotional distress. Wholly apart from the very dubious scientific bases for these two "expert" opinions, amici believe that admission of testimony of these two experts violated the First Amendment rights of the Church of Scientology.

The theory advanced by Dr. Singer has been recognized by courts confronted with it as repugnant to the First Amendment when presented as evidence in a courtroom. In *Katz* v. *Superior Court*, 73 Cal. App. 3d 952, 987 (1977), the court said: "When the court is asked to determine whether that change [of lifestyle] was induced by faith or by coercive persuasion is it not in turn investigating and questioning the validity of that faith?"

Dr. Singer's theory is that when certain elements can be found in the structure and practice of an organization, that organization is practicing thought reform, and individuals subject to the practices of that organization are victims of "coercive persuasion." There are six elements to Dr. Singer's model of thought reform programs. First, the organization must gain control of the individual's physical and social environment. Second, it must create a sense or powerlessness in the individual. Third, it manipulates rewards, punishments, and experiences to suppress old social behavior. Fourth, it manipulates rewards, punishments, and experiences to elicit new social behavior. Fifth, the person is kept unaware that he is being exposed to a program that is gradually changing his behavior. Sixth, the process must take place in a totalitarian structure with a "closed system of logic."

An analysis of this model will demonstrate that it could fit all religious organizations that proselytize, including those that are considered mainline religious organizations. One of two things must follow from this realization: either all religious groups will be potentially liable for successful proselytization; or courts, themselves, with or without the help of an expert witness, must make subjective determinations as to the validity of a religion in order to distinguish those that are engaged in "thought reform" and those that are not.

A. Element One: Control of Physical and Social Environment

The flexibility with which Dr. Singer applies the first element of her model in this case immediately demonstrates the subjectiveness of her conclusions. Contrary to the facts in this case, in *Molko* v. *Holy Spirit Association*, 46 Cal. 3d 1092, 252 Cal. Reptr. 122, 762 P.2d 46 (1988), another case in which Dr. Singer testified—in that case against the Unification Church—the plaintiffs there were

isolated on a farm owned by the Unification Church. The record, however, in this case as distinguished from *Molko*, shows that the plaintiff, during his involvement with the church, including his very early period, frequently lived independently of the church organization. At times he moved home to Wisconsin, went for long periods without participating in any auditing, and started up several independent businesses or worked for others. Faced with this situation, Dr. Singer found evidence of control of the plaintiff's physical and social environment in the fact that the plaintiff picked up the jargon of Scientology.

In *George* v. *ISKCON*, 213 Cal. App. 3d 729 (1989), *petition for cert. filed*, 58 U.S.L.W. 3598 (U.S. March 20, 1990) (No. 89-1399), Dr. Singer found that the religious group—in that case the Hare Krishnas—had gained control of the plaintiff's physical and social environment by virtue of the fact that the plaintiff had adopted the religious practice of chanting. This was so, she found, despite the fact that much of the chanting occurred in the plaintiff's bedroom in her parents' home and the fact that the plaintiff was regularly attending school.[2]

The ease with which Dr. Singer finds the first element of her model satisfied in these cases reveals the ease with which she, or another expert, could find it satisfied by any religious organization. Many churches conduct retreats for prospective converts. The very purpose of these

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[2] Amici believe that Dr. Singer's testimony in other cases is extremely relevant to an analysis of this case. If in fact Dr. Singer's analysis under her model of the structure and practices of various religious groups is nothing more than subjective evaluations of the validity of the religious beliefs of those groups, her testimony violates the First Amendment regardless of the terms in which it is presented to the jury. Not only may a court not impose liability on a religious organization based on a determination of a religion's validity by a judge or jury, it may not do so based on such a determination by a so-called expert witness.

retreats is to isolate the initiate from the normal social distractions of the world. In many religions, monastic orders occupy a privileged status. In Buddhism, for example, the monk is seen as preserving the essence of the religion because for a layman to achieve salvation within the dominant culture is virtually impossible. Clearly, physical and social isolation is a common practice in proselytization.

B. Element Two: Creation of Sense of Powerlessness

Dr. Singer testified that the plaintiff was made to feel powerless because he was led to believe that he wasn't able to handle the defects in his personality without the Church. This is no different from the teachings of almost any religion. Most churches preach that they hold the key to salvation, peace, and happiness. The Church of Christ, Scientist, or Christian Science Church preaches that its doctrine holds the key to physical health.

To say that creation of a sense of powerlessness is an element of a thought reform program implicates almost all religions. The very concept of God in Judeo-Christian tradition envisions an omnipotent God. A Christian finds salvation by surrendering his will to God's will.

C. Elements Three and Four: Manipulation of Rewards and Punishment to Inhibit Old Social Behavior and to Elicit New Social Behavior

The third and fourth elements of Dr. Singer's theory require the manipulation of rewards, punishments, and experiences to suppress old social behavior and elicit new social behavior. For instance, she says that the Church of Scientology rewards people by giving them better positions in the organization.

The avowed purpose of almost any evangelist would be to elicit new social behavior based on a new set of beliefs and to suppress old social behavior. All creeds have laws

relating to social behavior (*e.g.*, The Ten Commandments). The acceptance or rejection by members of the religious community depending on one's adherence to or departure from accepted behavior is commonplace. Congregations are likely to elect as elders those whose lifestyle best exemplifies the doctrines of their faith. Conversely, most denominations have internal discipline policies for punishing behavior that is contrary to their beliefs (*e.g.*, penance, public discipline, excommunication, shunning). The rewards promised and punishments threatened by mainstream denominations are not just of this world; they include life everlasting or eternal damnation. Once again, Dr. Singer has described something common to almost all religions.

D. Element Five: The Recruit Is Kept In An Uninformed State

The fifth element of Dr. Singer's model is that the individual is kept uninformed that he is going through a process that is intended to change his beliefs and behavior. Amici have difficulty understanding just what Dr. Singer meant by this element despite having studied her testimony on this point in several cases. A change of religion invariably entails a change of beliefs. Scientology quite plainly involves beliefs radically different from traditional Judeo-Christian beliefs, so conversion to Scientology would unavoidably entail changes of belief for most converts.

It appears that what Dr. Singer meant by this aspect of her theory was that the person is unaware that he/she is being subjected to a "thought reform" program, as she understands such a program. This merely assumes the presence of the very structure that Dr. Singer is trying to prove exists. This element will always be present unless an organization advertises that it engages in brainwashing. To find this element, one must assume that the doc-

trines preached by the organization have no persuasive force of their own.

E. Element Six: The Process Takes Place In a Totalitarian Structure.

Finally, Dr. Singer explained that the process must take place in a totalitarian structure, or what she calls a "closed system of logic." She explained the closed system of logic by saying that doubts and criticisms are answered by the accusation that the individual still has defects in his personality to be entertaining such negative thoughts.

As with the other elements of her model, this feature merely describes a characteristic common to almost all religions. To say that a system of logic is closed is tantamount to saying that it is whole or complete. Religions by their very nature purport to account, by their doctrines, for all of reality and in this sense are closed or whole systems of logic.

A frequent criticism of Christian theology is that it demands belief in phenomena that it cannot explain. An obvious example is the mystery of the Trinity. Unable to provide a rational explanation of the concept of the Trinity, it is simply declared a mystery incapable of human understanding. "Faith is the substance of things hoped for, the evidence of things not seen." Hebrews 11:1. "Belief in what one may demonstrate to the senses is not faith." *Ballard*, 322 U.S. at 94 (Jackson, J., dissenting).

This examination of Dr. Singer's theory reveals that it can only be applied in a particular situation by making subjective determinations about the religion involved. Its very purpose is to question the validity of religious conversions by questioning the validity of the religion itself.

Amici contend that civil courts may not use an expert witness as a vehicle for making judgments that the Constitution forbids it to make directly. The judgment in this

case gave the force of law to Dr. Singer's conclusion regarding the Church of Scientology and its beliefs and practices. In so doing, the First Amendment was violated.

The plaintiff also hired and paid $25,000 to Dr. Richard Ofshe, a sociologist, to study the Church of Scientology. Dr. Ofshe testified that by studying the organizational structure of the Church of Scientology he was able to determine that the Church was organized in such a way as to intentionally cause the plaintiff emotional distress. Just this bare description of Dr. Ofshe's testimony should shock anyone concerned about religious freedom. A closer look at the testimony will do nothing to relieve the initial shock.

Dr. Ofshe listed five components of the Church organization that indicated to him that it was organized to intentionally inflict emotional distress on the plaintiff. The first of these was the manner in which Scientology was presented to the plaintiff as having a basis in science. With respect to this component, Dr. Ofshe stated: "The significance of that is that it tended to convince Mr. Wollersheim that Scientology was an organization that could produce —that is deliver on what it was represented to him could be produced through involvement with the organization."

The second component was "the element used to convince Mr. Wollersheim that Scientology technology worked." Dr. Ofshe explained that by this he meant the plaintiff heard testimonials to the benefit of Scientology.

The third component was that the SEA Organization was presented to the plaintiff as an elite group and that the plaintiff "was impugned [sic] with the sense that the SEA Organization had a mission. It is essentially a mission to save the world. . . ." This sense of mission allowed the church to demand high levels of commitment and performance from the plaintiff.

The fourth component was the policies and practices used to establish Mr. Wollersheim's role as a Scientologist involving his behavior, attitudes, and feelings. Dr. Ofshe explained that by this he meant that there were rules against "acts of disloyalty or acts of criticism."

The fifth component was the policies designed to keep the plaintiff from leaving the Church. Among these policies Dr. Ofshe pointed to the fact that the Church had instilled in the plaintiff the belief that Scientology could solve his emotional problems, but that they would not be cured by psychology and psychiatry.

It is clear from this summary that Dr. Ofshe's entire testimony was based on the assumptions that Scientology is not valid, that those giving testimonials were lying, that the purported mission to save the world was a fraud, and that Scientology could not solve the plaintiff's problems, but that psychiatry could. Only by making these assumptions could one reach the conclusion arrived at by Dr. Ofshe. Even if one does make these assumptions, it is clear that this testimony was a blatant attack on the validity of the beliefs of Scientology and should not have been allowed in an American court. It is perhaps more offensive than Dr. Singer's testimony. It certainly suffers all the same shortcomings.

Amici have reviewed the testimony of the two experts used by the plaintiff because there is a growing trend of using experts such as and including Dr. Singer in, what *Amici* believe to be the modern form of, heresy trials before potentially hostile juries who do not easily understand or appreciate the existence of new religions and their teachings.

II. THE IMPOSITION OF PUNITIVE DAMAGES AGAINST RELIGIOUS INSTITUTIONS FOR A TORT CLAIM ARISING OUT OF RELIGIOUS PRACTICES VIOLATES THE FIRST AMENDMENT.

Closely connected and perhaps representative of what may occur in heresy trials is the utilization of punitive

damages to destroy new religious movements. Amici curiae believe that allowing the jury to award punitive damages in this case and in similar cases violates the First Amendment. The power of juries in California to assess punitive damages is almost unrestricted.

> Jury punitive damage awards of an unpredictable nature and appalling inconsistency continue to proliferate. Neither the Legislature nor the appellate courts have been able to formulate coherent reasonable guidelines and limitations for the remedy. Perhaps the quest is utopian and unrealizable.
>
> In practice, it lacks any semblance of consistency between defendants, or even the same defendant in cases tried by different juries.
>
> Because the Legislature has not prescribed guidelines for punitive damages, they must be awarded at whim.

Woolstrum v. *Maillous*, 190 Cal. Rptr. 729, 737 (Cal. App. 1983). The standardless discretion given to juries was made clear by the jury instruction in this case which said "[n]ow, the law provides no fixed standard as to the amount of such punitive damages. But leaves the amount to the jury's sound discretion [sic]."

This Court acknowledged the danger to First Amendment freedoms that can be caused by civil damage awards in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). In *New York Times* this Court held that the First Amendment guarantee of freedom of the press prohibited the regular application of the historic common law of libel when a media defendant was reporting on the actions of public officials. This Court announced a much higher standard that plaintiffs must meet in such cases in order to prevail. The standard included an entirely new element of "actual malice" that must be proved before recovery can be had. This standard must be met in order for the plaintiff to recover *compensatory* damages.

This Court specifically addressed the issue of punitive damages in the case of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). In that case the Court refused to extend the protection of the *New York Times* rule to cases involving private plaintiffs seeking compensatory damages. However, this Court ruled that the First Amendment does require that media defendants receive the protection of the *New York Times* rule even in cases brought by private plaintiffs when they are seeking punitive damages. This Court recognized the danger that punitive damages posed as a result of their very nature.

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

Id. at 350. It would appear from this case that even the gentle rule referred to by this Court has fallen by the wayside in California. While the danger posed by such damages is great, the State's interest in assessing them is slight. They represent a "windfall" to plaintiffs "to which they concededly have no right." *Rosener* v. *Sears Roebuck & Co.*, 168 Cal. Rptr. 237, 248 (Cal App. 1980) (Elkington, J., concurring).

The imposition of punitive damage awards against religious bodies undeniably burdens the free exercise rights of those bodies. They should be allowed only if justified by a compelling state interest not otherwise served. *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

In *Gertz* this Court recognized "the strength of the legitimate state interest in compensating private individuals for wrongful injury," 418 U.S. at 348, but added that

"this countervailing state interest extends no further than compensation for actual injury," *id.* at 349. In reaching its conclusion, this Court noted: "In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342.

Therefore, this Court held:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinions rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.
>
> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehoods reach no farther than is necessary to protect the legitimate interest involved. . . .
>
> Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injuries. Instead, they are private fines levied by civil juries. . . .

Id. at 349-50.

The free exercise of religion is no less in need of "breathing space" than freedom of the press. Religious institutions are just as inhibited in the pursuit of constitutionally protected activities as are media institutions by the threat of unrestricted punitive damage awards, and unorthodox bodies even more so. In fact, the burden placed on religious institutions, because of their nature, is even greater than that placed on media outlets. In *New York Times* the defendant that the Court felt was in need of special protection was a large for-profit corporation. Religious institutions are not-for-profit organizations largely, if not entirely, dependent upon voluntary contributions from the faithful. Not only are such organizations likely to have fewer assets, but the source of their income can be affected by a punitive damage award. It is not an unlikely prospect that donations will dry up if it is perceived that the money will go not to further the religious mission of the organization, but to satisfy a windfall judgment of a successful plaintiff.

This Court has recognized that certain types of entities need special protection from punitive damages because of the resulting harm to parties other than the wrongdoers that would be caused by such awards. In barring the award of punitive damages against municipalities in section 1983 actions, this Court reasoned:

> [P]unitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.
>
> Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the

> community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

Newport v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (citations omitted) (emphasis in original).

Similarly, this Court prohibited the assessment of punitive damages against the union in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979) (citations and footnote omitted), for the following reasons:

> Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial. Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have.

Just as the economic welfare of workers can be dependent upon the financial health of their union, the spiritual welfare of believers can be dependent upon the continued existence and functioning of their church as an institution. Church members should not bear this risk in order to supply a windfall recovery to a fully compensated tort plaintiff.

It is perhaps instructive to note that in *Newport* the plaintiff was asserting fundamental constitutional rights while the defendants asserted no constitutional defense. Under these circumstances, this Court still held that punitive damages caused too much harm to justify whatever value they had as a means of vindicating constitutional rights. In this case, it is the defendant and not the

plaintiff that is asserting a fundamental constitutional right. The institution that will be harmed by an award of punitive damages is one given special protection by the First Amendment. The rights of the plaintiff being vindicated are not constitutional in nature. In these circumstances it seems clear that the burden on First Amendment rights caused by the imposition of punitive damages against a religious institution is not justified by a compelling state interest.

There is a rise in litigation being directed against religious organizations. In case after case plaintiffs are seeking not only compensatory but also punitive damages. Since First Amendment rights are implicated, the time is ripe for this Court to determine whether punitive damages in circumstances such as presented in this case may be awarded to a tort plaintiff.

CONCLUSION

For the above reasons, amici urge that the petition for a writ of certiorari be granted in this case.

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Respectfully submitted,

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